

No. 2918.

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United States  
Circuit Court of Appeals,  
FOR THE NINTH CIRCUIT.

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Union Tool Company,  
*Defendant-Appellant,*  
*vs.*  
Elihu C. Wilson,  
*Complainant-Appellee.*

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Appellee's Brief in Reply to Appellant's Reply Brief.

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**Appellee's Brief in Reply to Appellant's Reply Brief.**

Pursuant to permission granted appellee on the argument of this appeal, this brief is filed as a reply to appellant's reply brief. We shall attempt to review briefly the clear errors, misstatements, discrepancies, misrepresentations, and bald and wilful departures from fact and record, which counsel for appellant is guilty of in this brief and likewise on argument.

The desperation of appellant's counsel is evidenced, to a large extent, by the inconsistencies into which he has been led in this case by the very position which he took in the companion case No. 2996. But that desperation is more strikingly evidenced by such per-

formances as that reflected by pages 22 and 23 of appellant's reply brief, and the dishonest cuts inserted between such pages. How counsel could entertain the slightest hope of deceiving Your Honors by the wilful garbling of facts and evidence in this matter last referred to, is beyond belief. Such procedure certainly is a slur not only upon the intelligence and watchfulness of appellee and his counsel, but savors of direct insult to the intelligence of this court, and is a tampering with the dignity of this court, and likewise, we submit, a palpable violation of counsel's oath as an officer of this court. Later on in this brief will be found a true statement and disclosure of the facts and evidence garbled and distorted and tortured beyond belief by this matter on pages 22 and 23 of appellant's reply brief, and particularly the insert cuts between such pages. At the outset, therefore, we feel justified in moving Your Honors to refuse consideration of such brief of appellant, if not also of the opening brief of appellant and appellant's argument, not because we desire that appellant's case, weak as it is, be not given full consideration, but because, we submit, that an attorney who will commit such acts as these complained of is not to be believed and relied upon in any part or phase of his presentation of the case. When, in a patent suit, an attorney wilfully misrepresents a single example of the prior art, and also the infringing device which is totally at variance therewith, and with the patent sued under, and tries to tell the court by word and picture that the infringing device is the device of the obsolete prior art, it is hard to see where there can be any such cleanness of hands or semblance



of equity remaining in the cause so represented to entitle such cause to any consideration. *Not only does such procedure virtually amount to an overt admission of infringement, by virtue of the resulting concession that the infringer has followed the patent in suit and not the prior art, but such concession is made in that spirit of trickery and desperation which warrants the dismissal of the party so represented from the court, not only by formal affirmation of the decree of the lower court, but with a sharp and unqualified rebuke.*

We have had occasion before, and it has been and is, we assure Your Honors, a disagreeable performance of duty, to criticise the procedure of appellant's counsel on argument and brief before Your Honors, not only for error in *application of law, fact and evidence*, but for error by *misrepresentation*. In that cause decided by Your Honors recently and reported at 227 F. R. 607, in which the appellee in this present case was the chief appellant, and the president of the appellant in this case was an appellee, we found it necessary to file an elaborate reply brief devoted mainly to the cataloguing of similar procedure on behalf of the same counsel. The opinion in that case, we beg leave to state, shows clearly that this Honorable Court was highly dissatisfied with, and highly disapproved of, the inethics and inequities with which the appellee's cause in that case was tinged. We have had frequent occasion similarly to address ourselves in the lower court to this same kind of garbling and misrepresentation on behalf of appellant's counsel. It is because of our appreciation of the energy, resourcefulness and ability of counsel, that we are amazed that

he should stoop to such tactics as these; and the fact that he does, coupled with his ability and resourcefulness, can mean but one thing, to-wit, that ability and resourcefulness cannot win for him and his cause is without merit. Such procedure is not, to our mind, indicative of cleverness, and, as we cannot ascribe it to the quality of stupidity, we must find it embraced within terms which need not be further expressed and identified than as hereinabove set forth. We respectfully leave this motion to suppress, in effect, counsel's briefs and argument, to the discretion and the full sense of justice of Your Honors, believing no supporting formal motion to this end need be presented independently of this present procedure by brief, inasmuch as a full inspection and reading of the briefs of appellant's counsel and their consideration conjointly with appellant's counsel's argument, are necessary to fully apprise Your Honors of the extremes to which counsel has gone in the premises.

Probably the most glaring of such reprehensible acts on the part of appellant appearing in its reply brief is the audacious attempt of appellant's counsel to deceive this court as to the true construction and organization of the reamer body and cutters of Double patent No. 2, namely, Double patent No. 748,054, disclosed in the record, pages 982 to 987, inclusive.

Counsel for appellant has rightly determined that to obtain a reversal of the decree of the lower court he must successfully urge the following two fallacies:

FIRST: That the cutters of the infringing Double underreamers have *not* been changed in construction

from the old and obsolete Double reamer patent No. 748,054, namely, that the bodies of the cutters have *not* been broadened to provide shoulders to co-act with broadened or extended bearings on the Double underreamer body, and also to give greater cutting surface to the cutters; nor have the intrust bearings at the backs of said infringing Double cutters been transferred downward much closer to the cutting edge than as located on the old style Double cutters; nor that the cutters have not been so changed as to comprise distinct dove-tailed shanks.

SECOND: That to the Double underreamer body has *not* been added the WILSON LUG CONSTRUCTION or element, which lug is that wedge-like projection which extends downwardly a material distance below the extreme lower end of the dove-tailed grooves or cutter-ways of the reamer body, and which lug or projection better braces the cutters apart, shortens the leverage on the cutters, lessens the strain upon the dove-tails and effectively resists the rotatory action of the cutters, and enables the use of broader cutters which greatly facilitates underreaming and provides more stock for use in dressing out the cutters.

A comparison of the old style Double underreamer patents, namely, those underreamers covered by patent No. 734,833 and patent No. 748,054 (it having been impossible to discover and put in evidence actual specimens of these obsolete underreamers), with the Double infringing underreamers and with the Wilson underreamers, proves conclusively that such changes and such appropriations of Wilson's invention *have* been

made in each and every one of the Double infringing devices, namely, the Double Improved underreamer and the Double reamers types D, E and F, and that appellant thereby departed from the constructions of the Double patent and followed the teachings of the Wilson patent. The testimony and evidence in that regard is absolutely conclusive and irrefutable.

Now let us see what counsel for appellant attempts to do to escape the damning effect upon his case of those unscrupulous acts. Note the trickery to which he resorts in his desperation. We fully believe Your Honors will be shocked by counsel's audacity.

On the page opposite page 22 of appellant's reply brief are three illustrations, one of which purports to be an illustration of the body of Double underreamer patent No. 2, namely, the Double patent No. 748,054. Another of these illustrations purports to be the back or inner face of a cutter of that same underreamer, which underreamer, as above stated, will be found illustrated in the record in the Double patent No. 2 shown at pages 983 to 987 of the record. Also, on the same inset page is an illustration purporting to be that of the Double reamer type D of appellant, which reamer has been declared an infringement of the Wilson patent. Now note the deception: The illustration purporting to be that of Double patent No. 2, instead of being that reamer, is, with only one slight exception (namely, that there is no hole shown in the lower end for the spring-actuated rod), *an exact illustration of one of the Double reamers appellant is now manufacturing, and which it commenced to make not until after the decree of the lower court determined the Double*



*Improved underreamer and Double reamers types D, E and F to be infringements of the Wilson patent.* It is true that in putting this later reamer construction before Your Honors we are departing from the exhibits and proofs in this case, but we are confident that it will be excusable in that it is part of our argument in nailing the falsity of the brief of appellant and the cuts therein now under discussion. We do so argumentatively, but our argument, as the court will see, is based upon a photograph of a real reamer and not a mere draftsman's sketch. If given opportunity to do so by supplemental reply brief, counsel will not have the temerity to deny the falsity of this photograph nor the facts we state about this late infringing reamer.

The cutter illustrated on the inset page of appellant's brief, opposite page 22, instead of being a cutter of Double patent No. 2, namely, of patent No. 748,054, is a cutter of the *Double Improved reamer*, namely, an infringing reamer—minus the short groove in the bearing faces of the cutter!

Your Honors will remember we called your attention to this deception while in open court. Counsel had the temerity to pick up a cutter of Double patent No. 748,054 and attempted to show Your Honors that it was the cutter illustrated in his brief. We then showed Your Honors a cutter of the *Double Improved reamer* type and called attention to the fact that that was the type of cutter illustrated in the brief, thereby exposing counsel's trickery. It was only by chance that we stumbled upon this deception on the day of argument, inasmuch as counsel's reply brief was not served upon us until we arrived in court.

Now, the above facts can be very easily proven to the entire satisfaction of Your Honors. By referring to Figure III of the patent No. 748,054, illustrated on page 983 of the record, it is to be readily observed that there were no intrust bearings provided on the Double underreamer body, and which projected downwardly below the extreme lower end of the dove-tailed grooves 15. In other words, the Double underreamer body or Double patent No. 2 was not provided with the WILSON LUG ELEMENT. To make this point more clear please refer to the Wilson patent No. 827,595 illustrated on page 977 of the record. The lugs 2' of the Wilson reamer patent were wedge-like extensions of the lower end of the reamer body, which extensions projected downwardly to a considerable distance below the extreme lower end of the shouldered cutter-ways of the reamer body. As illustrated by those drawings of the Wilson reamer the cutters are better braced apart by the use of such lug formation, and the fulcrum point or the point of greatest strain to the cutter is transferred from the weaker portion of the cutter down to the stronger portion of the cutter, and also the leverage is greatly reduced by having the fulcrum point closer to the lower or cutting edge of the cutter.

The greatest strain-applied to an underreamer cutter, or the greatest breaking strain at least, is that which tends to crush the cutting edges together toward each other when reaming upon the narrow ledges in the hole. The reamer performs the function of enlarging the hole which has been drilled ahead by the solid bit. It is the universal practice to run the drilling bit to

some considerable distance below the casing, depending upon the nature of the formations. The bit is then removed and the underreamer is substituted. The underreamer simply enlarges the hole previously drilled by the bit, and it will readily appear that in doing so it simply cuts away an annular shoulder produced by the difference in diameter of the hole drilled by the bit and that underreamer by the underreamer. This operation has a constant tendency to crush the cutters toward each other as the formation or rock breaks inwardly toward the center of the hole as the underreamer performs its work. This has a tendency to constantly reduce the hole to a funnel shape. The very great stresses which tend to crush the cutters toward each other at their lower ends will thus be readily understood by Your Honors.

Therefore, the lug formation of the Wilson underreamer body which projects downwardly between the cutters a considerable distance below the shouldered cutter-ways, or dove-tailed shouldered cutter-ways, as in the Double, very much better resists these great strains imposed upon the cutters and consequently prevents the breakage to cutters and damage to the dove-tails of the reamer body, which breakage and damage promptly condemned the Double underreamer of appellant's original construction, namely, that covered by appellant's patents No. 734,833 and No. 748,054, and which damage and breakage, due to the lack of this Wilson lug element, were the chief causes for the complete abandonment of such Double reamers. Likewise, the advantages of the Wilson underreamer and the complete success in that reamer in overcoming the diffi-

culties experienced in the use of the Double underreamer and all others which preceded, were promptly recognized by the appellant and were promptly adopted and incorporated in practically all of the reamers they have manufactured since the year 1905.

To again refer to the drawing on the page opposite page 22 of the appellant's brief it will be quite clear that the drawing purporting to be that of Double reamer No. 2, even though it has the fragments A, A, at the outer edges of the Wilson lug formation shown therein, nevertheless retains the major portion of the Wilson lug formation, which lug formation projects downwardly below the extreme lower end of the dovetails or shouldered ways of the body to form inner bearings for the cutters. With this point clearly understood the deception in that regard must fail to accomplish its purpose. The attempt to deceive this Honorable Court cannot succeed. Those little fragments A, A, as disclosed by the drawing, are very much broader and occupy very much more of the space of the Wilson lug formation of that reamer than is disclosed by the Double underreamers so-called which they have been manufacturing since the decree of the lower court, namely, the reamer shown in the photograph herein inserted and labeled "Appellant's Infringing Reamer Produced Since Decree."

As a matter of fact, these fragments A, A, in the actual reamers are very thin and an insignificant feature of those reamers, and are obviously left there with fraudulent intent to avoid the decree, and that is appellant's representation in selling such reamers. The cutters themselves in this late type just referred to re-

ASTORIAN'S IMPROVED METHOD  
PRODUCED SINCE 1882











APPELLANT'S CUTTING DOUBLE IMPROVED  
REARER TYPE







PHOTO OF WILSON CUTTER





tain their usual full width, and the intrust bearing faces on the cutters, instead of being on the shanks of the cutters, are largely on the backs of the bodies of the cutters, just as on all the cutters of appellant's infringing reamers. This later reamer possesses every Wilson advantage of the other infringing reamers, excepting type F.

Now, as to the cutter purporting to be Double patent No. 2, a glance at that illustration in appellant's brief will instantly reveal the fact that it is not at all the cutter disclosed in patent No. 748,054, namely, Double reamer patent No. 2. This will be very clear when comparing this illustration of the brief with the inserted photo of an actual cutter of Double patent No. 2 (which cutter was found in old unsalable stock in a supply house), and which will be found to agree with the drawings of Double patent No. 2. Referring to appellant's illustration, the shoulders 10 on this cutter are very clearly the same shoulders shown at the back of the Double cutters of the Improved underreamer, such as shown in the inserted photo labeled "Appellant's Cutter Double Improved Reamer Type." An examination of the exhibit of this type of reamer will entirely convince Your Honors of such fact. All of the several cutters of the inserted photos are among the exhibits in this case and case No. 2996. Now, compare that same cutter illustration with the drawings shown in patent No. 748,054, and with photos inserted herein. The parts 10-10 of Figures V and VI of the cutters shown at page 983 of the record, are simply two small "lugs" which co-act with the grooves 15, 15, at the lower end of the reamer body, shown in Figures

III and IV. In no sense are these lugs 10 intrust shoulders extending beyond any shank of a cutter, and it will be noted that they are entirely independent of the portion of the cutter which forms the cutting edge. Not so with the cutter illustrated opposite page 22 of appellant's brief. The difference is very marked.

Counsel for appellant has very carefully evaded a side view of the cutter in his illustration in his reply brief for the reason that the shoulders 10, 10, of his illustration would then be shown to have no dove-tail or interlocking function as do the lugs 10, 10, of the Double patent No. 748,054. In fact, the features 10, 10, of the Double cutter, patent No. 748,054, page 983 of the record, are solely and simply dove-tails for co-acting with the grooves 15 of the reamer body to prevent outward spread of the cutters. [See R. p. 985, lines 16 to 21.]

If parts 10, 10, of appellant's cutter illustration had any dove-tail function, like "lugs" 10, 10, or Double patent No. 2, there are no groove or dove-tails on the body with which they could co-act. They could not enter the so-called dove-tails 15, 15, of the illustration, which are totally different and differently located, with respect to the grooves 15 of Double patent No. 2. The court should compare this cut with that of the Wilson reamer cutter, page 978 of record, and with the photographs thereof inserted herein, and also with the photo of the Double Improved cutter inserted herein. It will be seen that the cut of appellant's brief is of an infringing cutter, just as we contend, and clearly not of the cutter of Double patent No. 2.

The slight enlargement of the lower end of the

Double cutter of Double patent No. 2 cannot contact with the body of the reamer, and is no suggestion of the Wilson or Double infringing cutters with lateral intrust shoulders.

The attempt to deceive this court is unquestionably the most unmitigated falsehood that has ever come to our attention in patent causes. We are astonished beyond measure that counsel for appellant should attempt to so grossly deceive Your Honors by such crude means. Certainly such conduct on his part indicates very clearly that appellant is guilty of the charge of infringement; and that its vain and futile efforts just pointed out above to conceal such from this court, now leaves it in the extremely awkward plight of standing before this court, accused of theft and with the purloined goods in its possession. Its own acts are sufficient to convict it.

Thus it is demonstrated that contrary to appellant's deceitful brief and cuts therein, appellant, in its infringing underreamer, entirely departs from and abandons the obsolete and unsuccessful features and parts of Double patent No. 2, with the functions thereof; and wilfully employs the patented features of the Wilson reamer, with their novel functions, in order that appellant might attempt to compete with the fully successful Wilson reamer:—*such features being the wedge-like downwardly projecting lug element and the cutters having lateral shoulders co-operating therewith and forming intrust bearings down on the body of the cutters, such cutters also having definite shank portions with shoulders for the cutter-ways on the body.*

It is to be noted at this juncture that it is an open



trade secret that appellant is asserting that appellant's infringing reamer produced since decree is not an infringement of the Wilson patent; and it is thus seen how very lightly it regards the decrees of the federal courts, and how much it is disposed to ignore them. This we can clearly point out by again referring to the illustration in its brief on page opposite page 22. The lower drawing thereon shows (with the exception of the hollow for the rod) the extension or lower end of the Double type D underreamer body. It clearly shows the wedge-shaped projection, viz.: *the Wilson patented lug construction* projecting downwardly below the extreme lower end of the dove-tailed cutter-ways. Now, appellant attempts to show that it can escape the charge of infringement and still continue to use practically all of this Wilson lug formation by simply adding the small elements A, A, in the corners where the lug construction joins with the dove-tailed cutter-ways, thus producing the device shown in the photo herein labeled "Appellant's Infringing Reamer Produced Since Decree." In other words, it simply leaves that metal on that portion of the Wilson lug construction which portion it contends it never did use. When that is accomplished the infringing reamer, thus slightly altered, is exactly like the drawing shown just above it, namely, the drawing which appellant pretends to be one of Double patent reamer No. 2. This further explanation of appellant's illustration will even more clearly point out the fact that the drawing disclosed on that page purporting to be the drawing of a body of the Double patent No. 2 reamer is merely a slightly

changed reamer from Double type D infringing reamer, and is still a reamer well within the charge of infringement according to the findings of Judge Cushman. Such a subterfuge is in common with that other one which we have so pointedly indicated to Your Honors in our opening brief, namely, the use by appellant of the detachable block held in place by the bolt or detachable cross piece in appellant's type F underreamer; and which block, as we have previously shown, is used merely for the purpose of concealing the infringement of the Wilson patent, namely, as a subterfuge. It has been proven that such block is entirely useless and can easily be discarded and still leave the type F underreamer a usable and workable machine.

To emphasize our charge of the wilful, deliberate and painstakingly accurate imitation of the Wilson reamer, which is exemplified in the Double type F reamer, not only as to construction of each and all of its important elements, but even as to the tools and appliances used in assembling and operating it, we invite special attention to pages 1011 and 1100 of the record. On page 1011 are shown the Wilson reamer parts and tools and appliances and at page 1100 are shown the Double type F parts, tools and appliances. Notable among the examples of such painstaking copying are the one piece body of pronged type (1) of the Wilson and the Double body of same type (201), both having a slot for the key of identical form, namely, the key 15 of Wilson and 208 of Double; such bodies of both reamers having the Wilson shouldered cutter-ways on the inner faces of the prongs and the Wilson lug elements

at the ends of the prongs; the same key moving tool (16) of Wilson, and 209 of Double; the same pilot key 17 of Wilson and 210 of Double; the same detachable cross piece or safety bolt 8 of Wilson and 204 of Double; the same slotted tee 5 of Wilson (view in cut preventing slot being seen) and 206 of Double; the same flat coil spring 4 of Wilson and 207 of Double; the wrench 13 of Wilson for removing bolt 8 of Wilson and corresponding wrench 212 of Double for the same purpose—and so on.

The offer to the trade of this type F reamer, with its not only imitative construction but imitative appearance and arrangement of features, coupled with the issuance of this Double reamer catalogue matter, *all amounts to unfair competition*, of which this court can take cognizance under the authorities, and likewise constitutes an aggravation of infringement. On this head see *Ludwigs v. Payson Mfg. Co.*, 206 F. R. 60, 65, with the authorities cited therein.

Having thus pointed out a few of the *most* glaring misrepresentations of appellant's reply brief we will now revert to the brief as a whole and to indicate succinctly its other glaring misrepresentations and its woe-ful failure to meet our argument and our opening brief in this case.

Appellant's reply brief, generally speaking, may be subdivided into eight general topics, as follows:

First: Pages 1 to 10, an attempt to establish that appellee disagrees with Judge Cushman of the lower court in finding claims 9 and 19 *of the Wilson patent*

*infringed*; also objecting to cross references to case 2996 and to the Bole key case reported at 227 Fed. 607, in which some of the principal parties of *these cases* were involved.

Second: Pages 10 to 21, pertains to the alleged anticipating device, namely, the Jones removable bowl reamer, its so-called successful use and sale more than two years, prior to Wilson's application for patent thereby rendering it a part of the prior art; that the Jones removable bowl reamer was not abandoned but was suppressed by Double as an infringing device.

Third: Pages 22 to 29, that appellant is operating under three Double patents including the Double patent No. 2. That the appellant has in no way departed from the structural relations and correlations of parts set forth in those three Double patents.

Fourth: Pages 30 and 31, that the key and slotted tee means of the Wilson improved underreamer are the elements which enabled the Wilson underreamer to supersede the Double improved underreamer, and appellant intimates that it expects to prove that the Wilson key combination was publicly used more than two years before Wilson's application for patent on same.

Fifth: Pages 32 to 68, appellant attempts to rebut our argument and the testimony in this case *which establishes the Wilson pronged construction of the Wilson underreamer* as the basis of practically all of the numerous and highly important advancements in the underreamer art, many of them entirely new, first, by showing either that such features are not used by ap-

pellant; second, are not patented by appellee; third, are anticipated by the Jones' removable bowl reamer and the O'Donnell and Willard underreamer; fourth, and that the Double patent No. 2, namely, patent No. 748,054, as shown on pages 982 and 983 of the record, entitles appellant to use the features and elements disclosed by the Wilson invention.

Sixth: Page 68, that appellant has nothing whatever to do with nor is it in any way connected with the matter referred to in our brief and which appears in the testimony in this case, wherein its chief witness Thomas J. Griffin proposed and stated to appellee that for a certain consideration he would leave the jurisdiction of this court; that he would testify no further in these underreamer matters; that he was through with counsel Lyon; that he would give appellee the benefit of certain evidence which would be complete answers to all of appellant's charges of infringements of Double underreamer patents by appellee; and wherein he stated that Double had never invented anything; and that R. E. Bole had admitted to him that certain documentary evidence introduced by him in the Bole key case had been forged.

Seventh: Pages 68, 69 and 70, is an effort on the part of appellant to escape the charge that the end block of its type F underreamer is a subterfuge, and further that it has used the divided bearings on the backs of the cutters of Double underreamers since the time of manufacture of underreamer disclosed by its patent No. 734,833.



Eighth: Pages 72 to 83, is another lengthy, tedious and futile effort to establish its contention that cases A-4 and B-62 were not properly consolidated etc.

As to the first division of appellant's reply brief: We will merely say that appellee in no wise disagrees with the lower court in finding claims 9 and 19 of the Wilson underreamer patent infringed by the Double reamers of the improved type, and types D E and F. Counsel's contentions to the contrary are not based on facts. However, we even stoutly maintain that the lower court had ample proof that other claims of the Wilson patent than 9 and 19 were infringed and that he erred in not so finding.

Our position must be clear from our opening brief, namely, that Judge Cushman, in our view of the matter, was not only justified in finding claims 9 and 19 infringed, but should have as consistently found further claims infringed. As to a cross appeal, that will be filed in this case as the better authorities seem now to persuade us, after the coming in of the master's report on the accounting in this cause. We believe it proper, however, inasmuch as Your Honors may consider this entire cause *de novo*, to submit to Your Honors the suggestion that it would not be against the spirit of equity to modify the decree of the lower court and find still further claims infringed, within Your Honors' discretion, if such procedure and findings should seem meritoriously supportable. This would obviate the necessity of again presenting these matters to Your Honors, and further extending already lengthy litigation over these issues. To that end, further briefs

might be called for if Your Honors thought necessary or proper.

We believe we are fully justified in apprising this court of all the intricate circumstances and pertinent facts relative to these underreamer matters even though we are obliged to go somewhat beyond the testimony disclosed in this particular case to do so, realizing that this is a court of equity and that in deciding this case Your Honors will desire to be fully informed as to all matters bearing upon the inventions in question and upon the relations of the parties to these suits, as established by the companion cases now under submission.

Inasmuch as the two kinds of reamers, the Double reamers and the Wilson reamers, found to infringe in these two cases, have been found to contain each the invention of both Double and Wilson patents sued under in the respective cases, it cannot be seen how real equity and justice could be done in these suits without jointly considering the relation of both inventions to the art, and the importance of the steps taken by both patentees as reflected by the production and development of the final types of reamers which have made underreaming a true success. Likewise, under the circumstances obtaining here, the two cases require inter-related or conjoint consideration under the doctrine of equivalents. We have not, at any time, intentionally gone beyond the issues of this present case other than by what we believe is proper reference to such matters as come within the doctrine of *stare decisis* and by a consideration of the threads which unavoidably unite the fabrics of both these cases 2918 and 2996.

Upon the records of these cases, it is perfectly clear

that Wilson is the president of and the principal party in interest in the Wilson & Willard Manufacturing Company, and that Double is the president of the Union Tool Company, and that the Union Tool Company in case No. 2996 is the same Union Tool Company in case No. 2918, and the Wilson & Willard Manufacturing Company in case No. 2996 is the same Wilson & Willard Manufacturing Company as in case No. 2918. Identity of interest is not the principal point here. The principal point is that the same general interests have been found to use each the invention of the other interest, with its own, in the manufacture of its underreamer product.

Counsel's briefs and argument glaringly assert the fallacy that appellant can escape from the charge of infringement in this case by attacking this and that element of claims 9 and 19 found infringed, as to novelty, irrespective of the law that a combination claim is a claim for an entity, and anticipation of separate parts of the claim, even if possible (and it is not in this case), is not anticipation of the entity of the combination. Counsel has so many times asserted this phase of patent law himself in the courts of this circuit, and has so repeatedly to that end relied upon the doctrine of *Yesbera v. Hardesty*, 166 F. R., 120, 125 (C. C. A.), that we feel that this court must be fully aware of the fact that counsel knows this is the law.

At the bottom of page 3 of appellant's reply brief, counsel clearly distorts our contention in our opening brief, namely, that the words "prongs" and "fork" are used in the Wilson patent and claims in three cases or senses, namely, first, as a formation providing for close

collapse of the cutters; second, as a formation permitting complete assembling of the reamer at the bottom of the body and re-machining of the reamer, and, third, a formation whereby the cutter ways and the lugs with their spreading bearings are *connected* with the remaining portions of the body. All of the infringing underreamers use the invention of Wilson with respect to case three, and "Type F" reamer uses the invention with respect to cases two and three. It is not necessary to revamp either claim 9 or 19, for it reads clearly upon the infringing structures. They are not like the narrow, limited specific claims in the patent in suit in case No. 2996. Under the three "cases," other claims clearly are infringed. In view of the decree in case No. 2996 and the findings of equivalence therein, infringement inevitably follows in this cause. Should the decree in No. 2996 be reversed, infringement here would still be fully established by the facts and law of this case. And particularly because appellant has appropriated the novel features and combinations, namely, the lug element of the Wilson patent, and the cooperating parts. A proper interpretation of claims 9 and 19, with reference to the use of the term "prongs" as above pointed out makes such a finding of infringement unavoidable.

As to the second division: True to counsel for appellant's usual custom he has again endeavored to deceive this court by an effort to prove that it was the Jones removable bowl type of reamer which Jones was obliged to cease manufacturing in response to a notice of infringement from Mr. Double. That statement is entirely contrary to the evidence as we will show.

Furthermore, we will prove to the entire satisfaction of this court that the Jones removable bowl underreamer was abandoned utterly by Mr. Jones and that it has no place in the prior art, so far as any disclosures to E. C. Wilson is concerned, or in any respect.

Now, note the testimony of Frederick W. Jones in that regard (and we will refer Your Honors to his testimony in case No. 2996, page 903, in which he testifies in regard to this same matter):

“I remember of receiving a letter from Mr. Lyon stating that I was not to manufacture any more reamers, that it was an infringement of a patent that the Union Tool Company controlled. I don’t remember the exact date, but it was sometime after we commenced to manufacture the *round nose reamer* with the circular cutters, like reamer in evidence, Defendant’s Exhibit Wooden Model Jones Underreamer. That was in 1902 I believe. I didn’t do anything about it. We quit manufacturing *those reamers at that time*. We did not want to get into a suit. We did not have no money to throw away for courts.

“Q. 335. (By Mr. Blakeslee): What was the substance of that letter?

“A. Well, I have already stated that the substance of it was that we was infringing on a patent of theirs, that we should not manufacture any more of the reamers.

“Q. 336. Was it an underreamer patent?

“A. Yes.

“Q. 341. (By Mr. Blakeslee): Were you from



that letter able to understand what reamer was referred to by the letter?

“A. Yes, certainly.

“Q. 342. What reamer was it?

“A. It was reamers that they were manufacturing.

“Q. 343. And what reamer was that?

“A. The reamer that was—that has just been on exhibition, exhibited here, the second reamer that was made. I cannot give you the numbers of it.

“Q. 344. You mean reamer like Double patent in suit #734,833?

“A. Yes.”

Again refer to testimony of Frederick W. Jones on page 907 of record #2996 which refers to the same subject:

“XQ. 371. (By Mr. Lyon): Now, after you had received this notice from me in the fall of 1902, to stop manufacturing, what you have here today said was the reamer like this wooden model, Defendant's Exhibit Wooden Model '(Jones Round Nose)' of Jones underreamer, and you and Skinner had stopped the manufacture of that, did you commence the manufacture of another type of reamer?

“A. Yes.”

And then the witness goes on to explain that the reamer which he then commenced to make was the Jones removable bowl type of reamer. Thus it will be clear to Your Honors that it was the *Jones round nose* type of underreamer which was suppressed by the notice from Mr. Double charging Jones with infringement. There is no testimony or evidence what-



soever in either of these cases to show that there was a second notice of any sort sent charging Mr. Jones with infringement. This one notice to which we have above referred is the only notice of infringement of Double underreamer patents received by Mr. Jones.

Quite clearly Mrs. Jones and George L. Skinner were in error of recollection in testifying that this notice pertained to the Jones removable bowl reamer, and equally clearly it referred to the Jones round nose reamer.

Now, to prove that the Jones removable bowl reamer was an abandoned experiment and that he discontinued its manufacture and sale simply because he could not sell them, we refer Your Honors to Mr. Jones' testimony, on page 790 of this record:

"Q. 114. (By Mr. Lyon): Why was it, Mr. Jones, that you discontinued the manufacture and sale or rental of underreamers like Defendant's Exhibit Fred W. Jones Reamer, types 1 and 2?

"A. I think the principal reason was that there wasn't any sale for them.

"Q. 115. And why was there no sale for them?

"A. I suppose the reason was they had to come into competition with other underreamers which could be sold cheaper.

"Q. 116. (By Mr. Lyon): Among which was the reamer manufactured by the Union Oil Tool Company at that time?

"A. Yes, and others on the market besides that."

Thus we see clearly that the Jones round nose reamer was discontinued by reason of Double's charges

of infringement and that the Jones removable bowl reamer which he made afterwards was discontinued because *it would not sell*. Mr. Jones had applied for a patent on the Jones removable bowl type of reamer, but its failures had been so pronounced that he did not even secure the issuance of that patent.

See his testimony on page 791 of this record:

“Q. 117. (Br. Mr. Lyon): Did you at any time file an application for letters patent of the United States upon either of these types of Jones reamer like Defendant’s Exhibit Fred W. Jones Reamer Type 1 or Defendant’s Exhibit Fred W. Jones Reamer Type #2?”

“A. On type 2 the application was filed.

“Q. 118. Can you give the date upon which such application was filed with the serial number of such application?”

“A. July 14, 1902, serial #115608.

“Q. 119. Was a patent ever issued to you on that application?”

“A. No.”

Was ever a clearer-cut case of utter abandonment of an experimental machine presented to Your Honor? The device was abandoned in 1902. Wilson invented his underreamer in 1903 and the early part of 1904. It has been proven conclusively that Wilson never saw nor ever heard of the Jones removable bowl type of underreamer until that reamer was presented in this case. Therefore he was an independent inventor and can in no wise be barred from the benefits of his patent by the Jones removable bowl type abandoned underreamer.

It must be borne in mind that, if Wilson was an independent inventor, his patent is valid over anything that Jones worked out and abandoned. As said in *Lincoln Iron Works v. McWhirter Co.*, 142 Fed. 967:

“It is not enough to defeat the patent that someone other than Gilmour had conceived the invention before he did, or had even perfected it, so long as it had not been in public use or described in some patent or publication. If Gilmour was an original inventor, though a subsequent one, it was his right to obtain a patent unless he had ‘surreptitiously and unjustly obtained the patent for that which was invented by another who was using reasonable diligence in adapting and perfecting the same.’ ”

Wilson was the independent inventor of an *entirely different thing*. In case No. 2996, for the purpose of comparison, we find Double did not independently produce the subject of his patent but got it largely from the Jones round nose reamer, which, in principle and largely in details of construction, was the same thing.

Furthermore, the Jones removable bowl reamer is just what its name implies, a *bowl type* of an underreamer—one which relied on a bowl to hold the cutters in place. Wilson’s underreamer has no bowl element in its construction. Wilson’s underreamer comprises two prongs, so constructed and so arranged as to provide cutter ways for holding the cutters firmly in place in the reamer body, and cutter expansion means as well. The Jones removable bowl type of reamer discloses absolutely nothing of such a nature and can in no wise be considered an anticipation of the Wilson

underreamer, nor can it be in any sense a defense to appellant's infringement of the Wilson underreamer patent.

Commencing at the bottom of page 10 and running on through pages 11, 12, 13 and 14, we find a pronouncement of patent law pertinent to prior uses and abandoned experiments which does not coincide well with the same counsel's position in case No. 2996, as to the Jones round nose reamer, the O'Donnell & Willard reamer and others. However, it has been proven that Wilson never heard of this Jones removable bowl reamer, and Jones' own testimony shows that it was a mere unsubstantial dream in the reamer art.

There is found a wilful falsehood at the bottom of page 11 of appellant's brief, where counsel says: "It is clear that he considered this Jones reamer a part of the prior art, for he says [Record p. 75, third line from bottom]: 'This removable bowl reamer ANTICIPATED the fork on the lower extension.'" Now, the record really is as follows: "This removable bowl reamer anticipated the forking of the lower extension of the patent in suit in so far as permitting the rod integral with the head or tee thereon—which carries the cutters—to be inserted from the bottom is concerned." In other words, counsel forms a new sentence in his quoted matter, disassociating the matter therein entirely from the specifically qualifying remaining portion of the context, and he also changes the very wording of Judge Cushman's decree in so doing. Counsel's garbled

recitation of the testimony would make it appear that the “fork” itself was anticipated, when Judge Cushman merely stated that the “forking” was anticipated in so far as inserting the rod for the cutters from the bottom of the reamer is concerned. We have shown that this Jones removable bowl reamer could not be assembled at the bottom.

*As to the third division:*

As to appellant’s efforts to establish its contention that the Double underreamer patent No. 2, namely, the patent No. 748,054, by reason of its small “grooves” 15, and slight dovetail shoulders 10, on the cutters to co-act therewith, was in any sense a sufficient disclosure to entitle appellant to use the Wilson lug construction and cutters with lateral shoulders with inner bearings on the faces of such shoulders, this has been very thoroughly answered, we believe, by our previous remarks. Their statements and their illustrations in support of such contention are false and spurious and are entitled to nothing but the condemnation of this court. Clearly practically every one of the reamers which have been made by the appellant since the Wilson underreamer first went on the market in 1904 and 1905 are bold imitations of the Wilson underreamer, bold pieces of piracy and flagrant infringements of the Wilson underreamer patent. Equally clear will it be to Your Honors that the Double underreamers covered by their patent No. 734,833, as well as those covered by patents Nos. 748,054 and 796,197, have *long since been abandoned and off the market*; that the unprecedented success of the Wilson under-



reamer and its prompt adoption by the oil operators was the occasion for the abandonment of those so-called Double underreamers, and that appellant's production from that time on was of reamers including the Wilson lug construction, and cutters with shoulders extended laterally and with bearing faces on same to co-act with the Wilson lug formation, and cutters having broader cutting surface, shouldered shanks, etc., etc. Those facts they cannot deny. *The underreamers they have been producing since 1906 speak for themselves.*

We need not again repeat our oft reference to the decision of this court in *Stebler v. Riverside Heights Co. et al.*, 205 Fed. 735, and the views which Your Honors therein asserted with respect to the reorganization of any prior art device and the relation of such necessary reorganization to the patented device for purposes of attempting anticipation. As we pointed out on argument in these cases, the reamer manufacturer involved in these controversies who has departed from his patented type is the Union Tool Company. Wilson's company never has departed from the Wilson invention. *The appellant here made the change and is the true infringer.* When the appellant here reorganized its reamer to include the combinations of claims 9 and 19, found infringed, *it abandoned the combinations patented by the Double patent*, such combinations of the Double patent being of parts admittedly old. It is absurd to say that appellant continued to use the Double invention after it had gone over to the use of the Wilson patent combinations. It might equally well be said that such altered reamers contained the



Swan invention and the O'Donnell and Willard invention for both of the same have hollow bodies, spring-actuated rods for operating the cutters, hollow slotted extensions, and the like. What appellant did here was to totally abandon the combinations of the Double patent or of any Double patent and to adopt the combinations of the Wilson patent as per the claims found infringed.

Appellant departs from the record in stating that the Double reamers were manufactured and sold and used from 1901 to 1905 to the exclusion of all other reamers. This statement appears on page 25. It is refuted by the record in case #2996, and there is no attempted proof as to such matters in this case.

On page 26 and following we find an exceedingly illogical argument as to the Double improved reamer being different from the Wilson reamer because the Wilson reamer is even superseding such Double improved reamer. This latter fact shows that even with the features of the Wilson invention incorporated in the Double reamer it is not as good as the Wilson. It is still deficient because it retains characteristics of the reamers of the Double patent in suit in case No. 2996. It has the new combination of Wilson and in addition to that combination it retains defective features of the Double patented reamers. We have proven conclusively, we submit, that the infringing reamers embody point after point of construction and advantage clearly appropriated from the Wilson invention and patent. Our opening brief applies the law to this situation, showing that it is not necessary that the de-

defendant use all of the advantages of the patent in suit in order that infringement be found.

Counsel gives his own argument a direct negation at the top of page 30, when he admits that the removable block 7 of the Wilson patent permitted assemblage at the bottom. This was not in any Double patented reamer or in any prior reamer or patent. There is no evidence in this case or the other case to show that the Wilson reamer was not a complete success by the use of this block. The key of the later Wilson patent, which Bole and Double attempted to appropriate by surreptitiously patenting the same, is merely a better device for this purpose. Our references to the controversy waged over the key reamer combination are for the purpose of showing the continued policy of piracy by the defendant here, and such references are certainly proper because of the insistence of appellant in bringing this Bole patent into this case, and because of the fact that this key combination is used in the infringing type F reamer.

It is true that later on even the Double improved and types D and E were almost if not entirely superseded by the IMPROVED WILSON UNDERREAMERS, namely, the one having the detachable key and slotted tee means of suspending the cutters. The testimony of Hubbard, Wilcox, Pickering and others in this case thoroughly establishes those facts. So completely were they superseded that the appellant found it necessary, as we have previously and repeatedly mentioned, to make still another change in its underreamer and to more closely and more particularly copy Wilson's un-

derreamer. *This they did by producing their type F underreamer* in which they actually abandoned the hollow slotted construction altogether boldly appropriating Wilson's pronged or forked construction with shouldered cutter-ways on the inner faces of the prongs, the Wilson patented lug construction at the end of the prongs for expanding the cutters, the cutters with lateral shoulders and shouldered shanks, the slotted tee and single-piece key means for suspending the cutters in the reamer body, and even using the Wilson safety bolt with merely an addition of the detachable block held in place by said safety bolt.

Counsel resorts to untruth on page 31 in referring to the features permitting the assemblage at the bottom of the Wilson reamer. The Wilson claims 5, 6 and 7, clearly cover this feature. Why counsel insists upon flying in the face of evident facts is beyond our comprehension. The Jones reamer cannot be completely assembled or disassembled from the bottom, and the "sub" or middle joint must be taken off for this purpose, and it cannot be remachined because the fixed spring-receiving shoulder in the body would be cut away. Counsel admits on page 34 that the spring cannot be inserted from the bottom in the Jones removable bowl reamer. Therefor in this respect it is not a pronged body in one sense in which the Wilson reamer is. It would be necessary to use the detachable spring seat of Wilson to make over the Jones removable bowl reamer in this respect. Defendant clearly infringes in type F in using parts which can be assembled from the bottom, whether or not of claims 9 and 19 specify assembling at the bottom. These

claims are not limited strictly to such assemblage. (See *Waterloo Cement Machinery Corp. v. Engel*, 240 F. 976.) The authorities cited by counsel on pages 35 and 36 should of themselves be sufficient to defeat appellee's case in suit No. 2996. To the present case they do not apply.

*As to the fourth division of appellant's reply brief:*

As just pointed out the Wilson key and slotted tee means for suspending the underreamer cutters was a later invention of Mr. E. C. Wilson. It was of great importance, but it had no part whatever in relegating the original Double underreamer to the abandoned list. The other and more prominent features of the Wilson underreamer had already done that without the aid of the slotted tee and one-piece key.

APPELLANT'S THREATENED ATTACK ON THE WILSON KEY PATENT BY THREATENING TO ESTABLISH PUBLIC USE OVER TWO YEARS BEFORE WILSON'S APPLICATION is exactly in keeping with Double and Bole's prior efforts to rob E. C. Wilson of that invention, which prior efforts will be clearly remembered by Your Honors as the instance where they attempted to prove that Bole was the inventor of that same key and same slotted tee form of underreamer. Such an effort on the part of appellant will probably receive scant attention by this court, inasmuch as in the Bole suit the complainants alleged that the invention had not been so publicly used over two years before Bole applied for patent, *and he applied before Wilson.*

*As to the fifth division of appellant's brief:*

Appellant's efforts to prove that the numerous great advantages of the Wilson pronged construction and the Wilson lug construction are not used by the appellant is ridiculous. The Double improved underreamer and types D, E and F clearly use the Wilson patented lug formation on the end of the reamer body, the broadened cutters, bearings on the backs of the broadened cutters; and in type F even the spaced pronged construction with the Wilson patented lugs, shouldered cutter-ways on the inner faces of the prongs, cutters with shouldered shanks to co-act with and to be operated in such pronged form of construction, single-piece key and slotted tee for retaining cutters in position, are all very clearly used. They do away with the middle joint of that type of reamer and assemble the reamer at the bottom. All these features are very apparent by even a casual glance at the infringing Double underreamers. It is to be noted that every one of these features is covered by the Wilson patent. It is to be also noted that in the type F Double reamers there remains scarcely one of the so-called Double elements.

As pointed out, the Jones removable bowl reamer was in no sense a reamer of such construction, nor was the O'Donnell and Willard, *as both were bowl types* of underreamers, having no shouldered cutter-ways for holding the cutters from swinging outwardly and being disengaged from the tee, nor were they in any sense *pronged underreamers so constructed as to engage and co-operate with the cutters entirely by the prongs.*



As referred to on page 39 of appellant's reply brief, any distinct differences pointed out by applicant Wilson in the patent office as between the patented Double reamers and the Wilson reamer do not avail appellant in attempting to escape infringement *in and by its reconstructed Wilsonized reamer*.

As has been clearly indicated in our opening brief the fact that Judge Cushman, although recognizing the differences in construction between the Wilson spaced pronged type and the Double hollow slotted type, in spite of such differences, found that the spaced pronged type of Wilson reamer was the equivalent of the Double hollow slotted type, places the two devices in the same category to the extent that when Double appropriated the lug or bearing and new features of cutter of the Wilson underreamer type and applied them to his hollow slotted type he immediately became an infringer of the Wilson patent. Wilson's patent grants him undeniable rights to the features he has invented and which Double has appropriated. Therefore, bearing in mind that the court has found the spaced pronged type of Wilson reamer to be the equivalent of the Double hollow slotted type, it becomes an indisputable fact that the Double improved type of underreamer, also types D and E, even though they still be of the hollow slotted type, are infringements of the Wilson patent within the clear meaning of claims 9 and 19 of that patent.

Type F is so clearly a deliberate infringement that no further argument is deemed necessary on that point.

It is to be borne in mind that it is *stare decisis* that the hollow slotted extension of infringing reamers D,



E and the improved reamer is the mechanical equivalent of the spaced prong termination or forked body termination of the Wilson patented reamer. That being the case, there can be no possibility of differentiating between these reamers so as to avoid infringement in this case, unless there be a reversal of the decree in case No. 2996. Such reversal, with the finding of non-infringement of the Double patent by the Wilson reamer, would not be fatal to a finding of infringement in this case, certainly not with respect to type F infringing reamer with its *spaced* prongs and detachable cross-piece between such prongs, nor even as to the other types, because the latter still contain the novel lug element of the Wilson patent and the cooperating cutters and lateral shoulders on such cutters of the Wilson patent, the cutters having the shouldered shanks and bodies of the Wilson invention. This substance of the Wilson invention, as included within claims 9 and 19, found infringed, and more specifically recited in claim 9, has been definitely incorporated in the Double reamers in reorganizing the same to depart from the Double patented reamer. We have seen that it is immaterial that there be specific differences in mode of operation of the Double and Wilson reamers as to the expansion and collapse of the cutters, for the *primary purpose and function of this cooperating lug element with its spreading bearings, and the cutters with lateral shoulders, is to hold the cutters spread apart AFTER EXPANSION, and to prevent rotatory action of the cutters tending to rip out the ways.* Likewise we find that this combination of novel features provides for a lowering of the inthrust bearing

down to and upon the body of the cutter, reducing the leverage of the cutter and its tendency to break out the ways on the body, and strengthening the cutter. In all these respects, the Double infringing reamers and each of them have followed the Wilson invention and infringed the claims thereof which cover such features. On this question of permissibility of differences in specific mode of operation in expansion and collapse, we again call the court's attention to the fact that both the Wilson reamer and the Double reamer type F include the key combination of the Wilson patent issued after Wilson, and not Bole, was found by Your Honors to be the inventor thereof. All the other features of the claims found infringed are present in the infringing reamers, namely, the body, the shoulders forming ways for the cutters, and the cutter shanks having shoulders cooperating with such ways. When defendant reorganized its reamer to provide this Wilson patented lug element, and added lateral shoulders to the cutters to cooperate therewith, and lowered the fulcrum point of the cutters, it did not merely change the Double reamer in sizes and shapes of parts, but, as we have seen, it entirely eliminated features of the Double reamer such as the lugs, 10, and grooves or pockets, 15, of the Double patent No. 2 and put in place thereof the Wilson patented elements. It is to be noted that in no one of the Double patents prior to Wilson, as well as in no other alleged prior device or prior patent, is there to be found this patented Wilson lug element arranged below the zone of the dove-tails or cutter-ways on the body and extending laterally beneath and beyond the same. We

have previously pointed out that whether or not the lug element be continuous as in all of the infringing reamers but type F or in two parts as in type F and connected by a detachable cross-piece and block, infringement still follows under the doctrine as to subdivision of parts, as exemplified in *Nathan et al. v. Howard*, 143 Fed. 889, p. 893, where it is said:

“Neither the joinder of two elements into one integral part accomplishing the purpose of both and no more, nor the separation of one integral part into two, together doing precisely or substantially what was done by the single element, will evade a charge of infringement. *Bundy Mfg. Co. v. Detroit Time Register Co.*, 94 Fed. 524, 538, 36 C. C. A. 375; *Dowagiac Mfg. Co. v. Brennen*, 127 Fed. 150, 72 C. C. A. 257.”

From page 49 on counsel refers to authorities which do not apply to the broad Wilson claims of the broad Wilson invention, but are sufficient in themselves for reversal of the decree in case No. 2996 in which appellees there hopelessly limited their specification and claims to specify details which appellant there does not employ. We invite the attention of the court to the file wrapper and contents of the Wilson patent as to the scope of the claims as originally inserted and as issued. The claims 9 and 19 never were changed in material substance.

*As to division 6 of appellant's brief as shown on page 68:*

Quite obviously the statements of appellant's chief witness, Thomas J. Griffin (and upon whose disreputa-

ble testimony appellees very largely rely in case No. 2996), as testified to by Mr. E. C. Wilson (after Griffin had hung his head in shame and silence and refused on advice of counsel to affirm or deny the facts), wherein Mr. Griffin had made the statement that Mr. Double had never invented anything, etc., etc., were so damaging to their cause, indicating so clearly the real position of Edward Double as an inventor so-called, that they were overwhelmed thereby and their only answer is: "That there is nothing whatever to connect defendant with the matters or things referred to." The position they take in that regard is so weak and so lacking in sincerity as to clearly establish the inference that they are unable to deny the statements made by Thomas J. Griffin, as we have shown to be the fact.

When Your Honors realize that the cases of appellant here and of appellees in #2996 are largely built up around the testimony of this person Griffin, who for many months was the handy man of counsel and his errand boy in getting together evidence for these cases, and sat at counsel's side during the taking of the lengthy proofs out of court in those cases as confidential adviser; and who, as the records show, was, until his death, jointly interested with Edward Double in many patent matters and in patent litigation involving appellee here;—when all these things are considered and the tactics and deportment of the person Griffin as above pointed out are borne in mind, the questionableness of the causes of the other side and their want of equitable cleanness of hands will be strikingly evident.

*As to the 7th division of appellant's brief, pages 68, 69 and 70:*

That the block or removable piece which is held in place by the safety bolt between the prongs of the Double type F underreamer is merely a subterfuge and an attempt on the part of appellant to mask its infringement is so clear and so certain as to render argument on that point absolutely unnecessary. That certainly is the only purpose of that block. They say that it is necessary in order to support the cutters. That statement is perfectly ridiculous. The intrust bearings on the lugs of the type F Double underreamer body are just as broad as are those on the lugs of the Wilson underreamer body, and not one single instance is there in both these records of even one complaint that the cutters of the Wilson underreamer are not properly braced and sufficiently braced by those lugs of the Wilson reamer body. Why then should the block be necessary in the Double type F? The answer is clear—the block is not necessary, it is a subterfuge, a mask by which appellant hopes to escape the charge of infringement. That appellant's statement that it has always used the grooved or divided bearings on the backs of Double reamer cutters is false, is shown by the exhibits in these cases and the photo herein of Double patent No. 2 cutter which was of a reamer later in production than that of Double patent No. 734,833.



*As to the eighth and last division of appellant's brief, pages 72 to 83:*

So thoroughly has our opening brief gone into the matter referring to the consolidation of cases A-4 and B-62, so thoroughly has it reviewed the rulings of Judge Bledsoe and Judge Cushman on the matter, and so clearly has it been established that their rulings were right and proper that we deem it hardly necessary to say anything further on that point.

This clutching at a straw technical defense has been disposed of three times by the trial court and is against all the equities of the issues. In B-62 bill we merely set forth the limitation to certain claims by election in A-4, which we were departing from by broadening out the issues by the bringing of B-62, and the procedure to be had thereon. There is no proof of any order of consolidation being granted on any representations other than those of the clear pleadings in the cases.

On page 79 counsel ignores the fact that two orders of consolidation were made and that appellant answered B-62 or the consolidated case after the order of consolidation was first made.

There was nothing in appellee's counsel's earlier statements, as Judge Cushman sets forth, to bar the extension of the charge of infringement. The remarks, such as that referred to by counsel on page 60 of appellant's brief, referred simply to the issues in A-4, but not as to the issues raised in B-62 and therefore in the consolidated cause.



There is but one decree in the *consolidated cause* A-4—B-62.

The statute of limitations has nothing to do with the case. We are only going to recover of course for the six years prior to the filing of our bill, and the defendant was organized only six years prior to the filing of the bill in B-62.

The pleadings in the case, under the rules, and the orders of Judge Bledsoe, all speak for themselves, and we come before this court with a meritorious cause of action against a wilful pirating defendant, and upon amply sufficient, if not over sufficient, and substantial, pleadings and proofs. The appellant in this case is the party who has changed position, moving over from the much-vaunted Double patented territory into the Wilson patented territory. The Wilson interests, appellant's in case No. 2996, did not so change over, but stood by the basic invention Wilson made, in unexplored territory in the reamer art. As we said at the argument, the Union Tool Company is therefore the infringer, not Wilson's company, the Wilson & Willard Manufacturing Company. The Wilson patent gave the reamer art the full substance of what it relies upon today in practice. The decree, we submit, should be affirmed, if not modified in favor of appellee. Falsification by brief alone should condemn appellant.

Respectfully submitted,

RAYMOND IVES BLAKESLEE,

*Solicitor and Counsel for Complainant-Appellee.*

